

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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ABDON L. DE LA PEÑA, BLEND A. DE LA
PEÑA, and DON'S PROFESSIONAL
SERVICES, LLC,

Petitioners,

- against -

UNITED STATES OF AMERICA,

Respondent.

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ROSLYNN R. MAUSKOPF, United States District Judge.

MEMORANDUM AND ORDER

12-MC-764 (RRM)

On November 9, 2012, petitioners Abdon L. De La Peña, Blenda A. De La Peña, and Don's Professional Services, LLC, jointly filed a *pro se* motion to quash a summons issued by the Internal Revenue Service. (Doc. No. 1.) This Court, by Order to Show Cause issued December 11, 2012, ordered petitioners to show cause in writing before this Court on or before December 31, 2012, why their motion to quash should not be denied for failure to comply with 28 U.S.C § 7609(b)(2). (Doc. No. 2.) By December 31, 2012, the Court failed to receive a response to the Order to Show Cause. As a result, on January 2, 2013, by Electronic Order, the Court denied the motion to quash and dismissed the instant petition. However, that same day, January 2, 2013, the Court received an affidavit from petitioner Abdon De La Peña (Doc. No. 3) requesting an extension of time to respond to the Order to Show Cause.

The Court granted the extension of time only as to the individual petitioners and extended the time to respond to January 14, 2013. (Doc. No. 4.) On January 14, 2013, petitioners Abdon De La Peña and Blenda A. De La Peña submitted an Affidavit in Opposition to Order to Show Cause. (Doc. No. 5.) For the reasons below, the motion to quash is DISMISSED for failure to comply with 28 U.S.C § 7609(b)(2).

Pursuant to statute, the petitioners were required to "begin a proceeding to quash [the] summons not later than the 20th day after the day [] notice is given" 28 U.S.C

§ 7609(b)(2)(A). Here, the Internal Revenue Service gave notice on October 19, 2012. (Doc. No. 5, Ex 1(b), Ex. 2(b).) Petitioners had until November 8, 2012 to file their motion to quash with the court, but petitioners filed their motion to quash on November 9, 2012, twenty-one days after receiving notice of the summons. (*See* Doc. No. 1.) Therefore the waiver of sovereign immunity by the United States had lapsed and petitioners' motion to quash is dismissed for failure to comply with 28 U.S.C. § 7609(b)(2)(A). *See Cosme v. I.R.S.*, 708 F. Supp. 45, 47 (E.D.N.Y. 1989) (denying motion to quash filed more than 20 days after notice as given).

Additionally, petitioners were required to, “not later than the close of the 20-day period referred to in subparagraph (A) [,] . . . mail by registered or certified mail a copy of the petition to . . . such office as the Secretary may direct in the notice” 28 U.S.C § 7609(b)(2)(B). The Internal Revenue Service has specified that in addition to “fil[ing] your petition [to quash] with the court, you must mail a copy of your petition by certified or registered mail . . . to the IRS. Mail the copy for the IRS to the officer whose name and address are shown on the face of th[e] summons.” I.R.S. Form 2039-D, Part D (Rev. 12-2001). Here, petitioners indicate that their motion to quash was mailed by “certified mail” to “ERIC BETZ, IRS” and “HON. LORETTA E. LYNCH, ESQ” on November 13, 2012. (Doc. No. 5, Ex. 3(a).) Petitioners' service is defective because: 1) the motion to quash was mailed twenty-five days after receiving notice, which is outside of the 20-day statutory requirement period, and 2) the motion was not mailed to the IRS officer, Susan Cavallo, whose name and address are shown on the face of the summons within the 20-day period. Therefore, petitioners' motion to quash is also dismissed for failure to comply with 28 U.S.C. § 7609(b)(2)(B). *Dame v. United States*, 643 F. Supp. 533, 534–35 (S.D.N.Y. 1986) (denying motion to quash where petitioner failed to show he served the motion within the 20 day period).

Accordingly, for the reasons discussed above, petitioners' motion to quash is
DISMISSED. The Clerk of the Court is directed to mail a copy of this Order to both petitioners.

SO ORDERED.

Dated: Brooklyn, New York
January 17, 2013

Roslynn R. Mauskopf

ROSLYNN R. MAUSKOPF
United States District Judge